Supreme Court, U.S.
FILED
0014 13 MAR 12 2001

No. ____

IN THE
Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *et al*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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57 pp

Ysleta del Sur Pueblo, a federally recognized Indian tribe, has engaged in gaming activities since 1993, greatly improving the impoverished lives of its members and benefitting the local community. Relying on the gaming provisions of the Pueblo's Restoration Act, 25 U.S.C. § 1300g-6, the Attorney General of Texas has sued to enjoin the activities.

QUESTIONS PRESENTED

1. Did Congress unequivocally express an intent to abrogate Petitioners' tribal-sovereign immunity from suit by providing in section 1300g-6(c) that "nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section"?

2. Did Congress condition the bringing of a suit under such abrogation, if any, upon the authorization by the state legislature?

3. Does the abrogation of immunity in section 1300g-6(c), if any, extend to state law causes of action?

LIST OF PARTIES

State of Texas

John Cornyn,
Attorney General

Ysleta del Sur Pueblo,
a federally recognized Indian tribe, 25 U.S.C. § 1300g *et seq.*

Tigua Gaming Agency,
a regulatory agency of the Pueblo

Tribal Council,
the governing body of the Pueblo, 25 U.S.C. § 1300g-3(b)

Albert Alvidrez,
Tribal Governor (although not a Petitioner, Governor Alvidrez was added as a Defendant in the State's Second Amended Complaint filed 15 February 2001, and is being disclosed for the sake of completeness)

Filbert Candelaria,
Lieutenant Governor (sued originally as interim acting-Governor)

Francisco Hernandez,
Gaming Commissioner

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2. Did Congress condition the bringing of a suit under such abrogation, if any, upon the authorization by the state legislature?
3. Does the abrogation of immunity in section 1300g-6(c), if any, extend to state law causes of action?

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PETITION FOR A WRIT OF CERTIORARI

Come now Ysleta del Sur Pueblo, the Tigua Gaming Agency, the Tribal Council, Filbert Candelaria, and Francisco Hernandez seeking certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered on 31 October 2000, Appendix at 1a. The motions for rehearing and rehearing en banc were denied on 12 December 2000, Appendix at 6a. Although this is an interlocutory appeal, the jurisdiction of this Court is invoked pursuant to the *Cohens* [1] doctrine under 28 U.S.C. § 1254(1) because it involves the denial of the immunity from suit claims of an Indian tribe and its agencies and officials.

[1] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

OPINIONS BELOW

Petitioners appealed two orders of the United States District Court for the Western District of Texas, both of which denied their claims of immunity from suit. The 3 December 1999 order is reported at 79 F. Supp. 2d. 708, Appendix at 8a-19a. The 13 January 2000 order, Appendix at 20a -27a, is not reported, and neither is the opinion of the Fifth Circuit affirming the district court's rulings, Appendix at 3a-5a.

STATUTORY PROVISIONS

The pertinent statutory provisions, 25 U.S.C. §§ 1300g-4(f) and 1300g-6, are set out at pages 28a-29a of the Appendix.

STATEMENT OF THE CASE

Petitioner Ysleta del Sur Pueblo is a federally recognized Indian tribe whose reservation is in El Paso County, Texas. See 25 U.S.C. § 1300g *et seq*. Petitioner Tribal Council is the governing body of the Pueblo. 25 U.S.C. § 1300g-3(b). Petitioner Filbert Candelaria is a member of the Tribal Council and is sued as such. Petitioner Tigua Gaming Agency is a tribal agency charged with regulating the Pueblo's gaming activities. Petitioner Francisco Hernandez is the Pueblo's Gaming Commissioner, *i.e.* head of the Tigua Gaming Agency, and is sued as such.

In 1968 the United States recognized the Tiwa Indians of the Ysleta del Sur Pueblo as an Indian tribe and at the same time transferred its trust responsibilities for the Pueblo to the State of Texas. Tiwa Indians Act, Pub. L. No. 90-287, 82 Stat. 93 (1968). In 1983, the United States and the Pueblo initiated steps to restore federal trust status to the Pueblo. In 1987, Congress passed the Ysleta del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act"). *See* 25 U.S.C. § 1300g *et seq*. (codification of those provisions pertaining to the Pueblo).

Although the Act granted the State of Texas Public Law 280 type jurisdiction over the Pueblo's reservation, 25 U.S.C. § 1300g-4(f), it also contained specific provisions limiting the extent of that jurisdiction over gaming activities by the Pueblo. *See* 25 U.S.C. § 1300g-6.

In 1988, Congress created a nationwide, federal regulatory system governing gaming on Indian land, known as the Indian Gaming Regulatory Act ("IGRA"), codified at 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166 *et seq.* Class III gaming [2] on Indian land is lawful if authorized by a tribe located in a state which "permits such gaming for any purpose by any person, organization or entity," and if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe." 25 U.S.C. § 2701(d)(1).

After attempting to engage the governor of Texas in negotiations for a Tribal-State Compact for more than a year, in 1993 the Pueblo sued the State of Texas and, in the alternative, its governor seeking a declaration that the State had failed to negotiate in good faith for a compact, and an order granting the Pueblo the specific remedies provided by IGRA. 25 U.S.C.§ 2710(d)(7). The State and its governor moved to dismiss the Pueblo's complaint, claiming that the Tenth and Eleventh Amendments barred suit. The district court denied the motion. In cross-motions for summary judgment, the parties raised the issues of whether Texas law permitted the requested gaming activities [3] and whether the Restoration Act prohibited gaming activities on the Pueblo's reservation.

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[2] IGRA divides gaming into three classes. Class III gaming is gaming that is neither social or traditional Class I gaming, nor within the various bingo, pull tab, and card games which are authorized as Class II gaming under the statute. *See* 25 U.S.C. § 2703(6)-(8).

[3] The requested gaming activities were baccarat, blackjack, "craps" (dice), roulette, and slot machines.

The district court granted the Pueblo's motion for summary judgment holding the requested gaming activities were permitted under Texas law and thus were a proper subject for the tribal-state negotiations contemplated by IGRA. *Ysleta del Sur Pueblo v. Texas*, 852 F. Supp. 587 (W.D. Tex. 1993). The State and its governor appealed.

The Fifth Circuit held that the Restoration Act, not IGRA, governed gaming by the Tribe and, since the Restoration Act did not abrogate the State's Eleventh Amendment immunity, it ordered the Pueblo's suit be dismissed for lack of jurisdiction. *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1994).

Prior to the Fifth Circuit's ruling, the Pueblo, in good faith and with full knowledge of the State of Texas, commenced Class II gaming activities on its lands under the auspices of the National Indian Gaming Commission ("NIGC"), the federal regulatory body created by IGRA. Texas was aware of and did not object to the NIGC's oversight of the Tribe's Class II gaming activities. The State participated in activities necessary for the NIGC to approve the Class II management agreement. The State also offered to negotiate a compact pursuant to IGRA for Class III lottery and pari-mutuel racing.

At the time of the Pueblo's suit, a majority of the families of the 1300-member Pueblo were impoverished. A March 1993 income analysis of tribal members indicated that 68% of the heads of households had less than $15,000 in annual income, with an additional 16% earning less than $5,000 annually. Appendix at 30a-31a.[4] The Pueblo looked to gaming revenue to improve the lives of its members and has continued its gaming activities believing such are not

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[4] The affidavit of Miguel Pedraza was filed with the Fifth Circuit in the referenced appeal in support of the Pueblo's Motion for Expedited Appeals Procedures.

"prohibited under the laws of the State of Texas." *See* 25 U.S.C. § 1300g-6(a).

It is now common knowledge in the community that not only has the Pueblo's gaming activities improved the lives of its members, but that such activities have proved "to be a boon" to the surrounding area and economy. *See* Appendix at 33a-34a. Nonetheless, the Attorney General of Texas filed an Original Complaint for Injunctive Relief on September 27, 1999, bringing a federal cause of action pursuant 25 U.S.C. § 1300g-6 to enjoin Pueblo-sponsored gaming activities on its reservation.

Petitioners filed their original 12(b) Motion to Dismiss contending, among other things, that their tribal-sovereign immunity from suit barred the action, to wit: Ysleta del Sur Pueblo is a federally recognized Indian tribe; that it possesses immunity from suit; that it has not waived its immunity; that Congress did not abrogate its immunity by granting the State limited jurisdiction in 25 U.S.C. § 1300g-4(f); that Congress did not abrogate the Pueblo's immunity in the gaming provisions found at 25 U.S.C. § 1300g-6 or, if it did, Congress conditioned its exercise on specific authorization of the suit by the State; that the State of Texas, through its legislature, has not specifically authorized this suit and thus has not exercised its power under the conditional abrogation; that the governing body, regulatory agency, and officials of the Pueblo share in its immunity; and, that *Ex parte Young* type relief against the individuals is not appropriate. Petitioners also argued that the Attorney General lacked authority to prosecute the action on behalf of the State. Petitioners' argument that the Attorney General lacks authority to bring the suit is separate from and in addition to their argument that the state legislature has not specifically authorized this suit in the first instance.

The district court denied Petitioners' motion to dismiss on the basis of sovereign immunity in its Order Regarding

Defendants' Motion to Dismiss (the "December Order"), holding that 25 U.S.C. § 1300g-6(a)-(c) constitutes an unequivocal and, apparently, unconditional abrogation of tribal immunity, and that the decision in *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680-681 (5th Circuit 1999) permits injunctive relief when brought against the Tribe and its officials. The court did, however, order the Attorney General to replead and specify his authority to prosecute this action.

On December 16, 1999, the Attorney General filed the First Amended Complaint for Injunctive Relief; the next day the district court ordered Petitioners to file an answer to it. Before filing their answer, Petitioners filed a Supplemental Rule 12(b) Motion to Dismiss on January 7, 2000, contending that the Attorney General did not simply specify his authority in the new pleading, but that he also brought a new state law claim by requesting that Petitioners be enjoined pursuant to Chapter 125 of the Texas Civil Practices and Remedies Code (public and common nuisance). Tex. Civ. Proc. & Rem. Code. Ann. § 125.001 *et seq.* Petitioners argued that whatever abrogation of immunity might be contained in section 1300g-6, it did not extend to the state law claim and, in fact, section 1300g-6(b) specifically prohibited the application of such laws to gaming activities on the Pueblo's lands.

The district court denied Defendants' Supplemental Motion to Dismiss on January 13, 2000 (the "January Order"), holding that Chapter 125 constituted sufficient authority for the Attorney General to seek injunctive relief under the Restoration Act.

Petitioners appealed both orders. In their Briefs filed with the Court of Appeals and at oral argument, Defendants only addressed the denial of their motions to dismiss based on tribal immunity. Included in the arguments was their "conditional-abrogation" contention that the state legislature must specifically authorize the bringing of this particular action. The Court of Appeals affirmed the district court's

holding that section 1300g-6(c) represents a clear abrogation by Congress of the Tribe's immunity for an action to enjoin violations of the act. The Fifth Circuit did not address the conditional-abrogation theory, apparently construing it as a lack of authority argument which was not reviewable at that time. Presumably for the same reason, the Fifth Circuit did not determine whether Congress abrogated Petitioners' immunity with respect to a state law claim.

ARGUMENT

1. Neither this Court nor any of the other Courts of Appeals have traveled as far as the Fifth Circuit to find congressional abrogation of a tribe's immunity from suit.

Congressional abrogation of tribal immunity must be express, unequivocal, and appear on the face of the legislation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). "Unequivocal" means capable of being understood in only one way. Black's Law Dictionary (West Publishing Co. 5th ed. 1979). If section 1300g-6(c) is susceptible to a reasonable interpretation which does not abrogate the Pueblo's tribal immunity, federal law requires the adoption of such interpretation. Since such a reasonable interpretation exists, the Fifth Circuit erred in affirming the district court's rulings.

The Restoration Act's gaming provisions, 25 U.S.C. § 1300g-6, preempts state law on the matter. Under the general grant of jurisdiction in the Restoration Act, 25 U.S.C. § 1300g-4(f), the state exercises Public Law 280 type jurisdiction, *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 685 (5th Cir. 1999), which includes criminal offenses committed by or against Indians but not Indian tribes. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1986). Section 1300g-6, however, preempted such jurisdiction with respect to gaming. *Ysleta del Sur Pueblo v.*

State of Texas, 36 F.3d 1325, 1329 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995) (the Senate Report accompanying the legislation stated that the central purpose of the provision is to treat gaming on the reservation "as a matter of federal law.")

The Restoration Act preempts state law by creating a federal prohibition (which references state law) and creates federal penalties for violation of the federal law, including criminal sanctions. 25 U.S.C. § 1300g-6(a). A reasonable interpretation of section 1300g-6(c) is that Congress has permitted the state to seek injunctive relief for violation of the federal gaming prohibition against those over whom the state would have had jurisdiction under section 1300g-4(f) if Congress had not preempted such jurisdiction under section 1300g-6(a).[5] Because the state had no jurisdiction over the Pueblo under section 1300g-4(f), there is no warrant to conclude that Congress abrogated the Pueblo's tribal immunity from suit. Just because Congress makes a federal statute applicable to Indian tribes, and just because Congress provides that violations of the statute may be enjoined, does not mean that Congress has waived the tribes' immunity from suit. *See Florida Paraplegic Associations, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129-1132 (11th Cir. 1999) (in which, the Court held the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, applied to Indian tribes, but that sovereign immunity barred any suit otherwise authorized by the statute). Because a reasonable interpretation of section 1300g-6(c) exists which does not abrogate the Pueblo's tribal immunity, the statute is not unequivocal and the case should be dismissed.

In those cases in which a court has found a waiver of tribal immunity, the federal legislation clearly indicated that it was

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[5] As a general rule, a court may not enjoin the commission of a crime. *See In re Debbs*, 158 U.S. 564, 593 (1895).

the tribe, and not some other party, which was to be subject to suit. In *Public Service Co. v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir.1994), and *Northern States Power Co. v. Prairie Island Medwakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir.1993), the courts found abrogation of tribal immunity in the Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA"), 49 U.S.C. § 1801 *et seq.* (repealed 1994). While in effect, the statute provided that "[a]ny person, including a State or political subdivision thereof or Indian tribe, directly affected by any requirement of a State or political subdivision or Indian tribe, may apply to the Secretary [of Energy] . . . for [an administrative] determination of whether that requirement is preempted by [federal law]." 49 U.S.C. § 1811(c)(1). The statute also stated that "[n]othing in [this section] prohibits a State or political subdivision thereof or Indian tribe, or any other person directly affected by any requirement of a State or political subdivision thereof or Indian tribe, from seeking a determination of preemption in any court of competent jurisdiction in lieu of applying to the Secretary under paragraph (1)." 49 U.S.C. § 1811(c)(2). No party other than a governmental entity attempting to regulate transportation of hazardous material would be a proper party for determination of pre-emption by federal law of such regulation.

In *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir.1989) and *Washington Department of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465, 1469 (9th Cir.1985) the courts found abrogation of tribal immunity in the definitional scheme employed in the Resource Conservation and Recovery Act of 1976 ("RCRA"). In an attempt to remedy pollution caused by improper disposal of hazardous and solid waste, the act authorizes citizens to bring suits to force compliance with the statute "against any person . . . who is alleged to be in violation [of the statute's substantive provisions]." 42 U.S.C. § 6972(a)(1)(A). The definition of "person" includes a

"municipality," which in turn encompasses "an Indian tribe" by express statutory delineation. 42 U.S.C. § 6903(13), (15). *See also Osage Tribal Council v. United States Department of Labor*, 187 F.3d 1774, 1181-1183 (10th Cir. 1999), in which the court relied the same type of definitional scheme to find abrogation of tribal immunity in the whistle blower provisions in the Safe Drinking Water Act, 42 U.S.C. §§ 300f(10) and (12), 300j-9(I)(2)(A).

In each of the cases, the statutes either named Indian tribes as proper parties or the only logical party against whom relief could be sought was a governmental entity such as an Indian tribe. The same cannot be said of section 1300g-6(c) of the Restoration Act. The Eleventh Circuit faced a similar situation in *Florida Paraplegic* where it found that the American with Disabilities Act did not abrogate tribal immunity even though the substantive provisions of the act applied to Indian tribes. 166 F.3d at 1129-1132.

Other courts have acted likewise in refusing to find congressional abrogation of tribal immunity absent the circumstances set forth above. *See, e.g., Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263-1265 (10th Cir. 1998) (Ute Partition and Termination Act of 1954, 25 U.S.C. §§ 677-677aa); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994) (Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716); *Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Commission Against Discrimination*, 63 F. Supp. 2d 119 (D. Mass. 1999) (Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. §§ 1771-1726); *Buchanan v. Sokogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1046-1048 (E.D. Wis. 1999) (Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*); and *Superior Oil Co. v. United States*, 605 F. Supp. 674, 678-680 (D. Ut. 1985), *rev'd on*

other grounds, 798 F.2d 1324 (10th Cir. 1995) (Omnibus Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g).

2. The decision of the Fifth Circuit disrupts the careful balance of federal, tribal, and state interests struck by Congress in the gaming provisions' enforcement scheme.

Suit against Petitioners under section 1300g-6 is a public policy decision which must be enabled by the state legislature. Even if section 1300g-6(c) is an abrogation of the Pueblo's immunity, which the Pueblo does not concede, such provisions are strictly construed. *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999). The enforcement scheme is part and parcel of the federal pre-emption of state law concerning gaming on the Pueblo's reservation. This Court recognizes that the history of tribal sovereignty serves as a necessary "backdrop" in examining congressional intent to preempt state law on an Indian reservation, with each case requiring a "particularized examination of the relevant state, federal, and tribal interest." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989), quoting *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982). Such a "particularized examination" is lacking in both lower courts' analysis.

The language of section 1300g-6(c) is clear—Congress said the "State of Texas" and not the "Attorney General of the State." Congress knows how to grant state attorney generals such authority if it so desires. *See* 15 U.S.C. § 15c(1)(a) ("Any attorney general of a State may bring a civil action[.]") The language used in section 1300g-6(c) is comparable to that employed in the Indian Gaming Regulatory Act: "Any State and any Tribe may enter into a Tribal-State compact[.]" 25 U.S.C. § 2710(d)(3)(B). Two Tribal-State compacts, each agreed to by the governors of the states, have been struck down because they were not approved by the legislatures of

the states. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir.), *cert. denied*, 522 U.S. 807 (1997); *Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992).

The Restoration Act vests the public policy decision to sue this federally protected Indian tribe with the regular public policy decision maker of the State—its legislature. In balancing the interests of the federal government, the Pueblo, and the State, Congress appropriately restricted to the state legislature the important public policy decision to sue the Pueblo. It is for the state Legislature to specifically authorize a new Indian war. It is not the prerogative of the Attorney General to establish the public policy of cooperation or conflict between these two sovereigns, the State and the Pueblo.

Congress also provided in the Restoration Act that the State of Texas is authorized to enact special legislation and to perform any services benefitting the Pueblo not inconsistent with the provisions of the Restoration Act. 25 U.S.C. § 1300g-3(a). Does the Attorney General contend that section 1300g-3(a) authorizes him to perform such tasks? Of course not, because he has no power to establish the public policy of Texas. Texas law specifically provides that the Attorney General lacks authority to bind the State:

> An admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state.

Tex. Gov't. Code Ann. § 402.004 (Vernon's 1998). This section creates two problems for the Attorney General. First, he does not and cannot make public policy for the State. Second, his actions are ineffective to bind the State. In the instant case, the attorney general is seeking to establish the public policy of the state. He does not have that power. In *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S.

1071 (1994), the attorney general was seeking to impose his views on the outcome of the judicial election lawsuit. The *en banc* decision noted that the attorney general had the authority and duty to represent state officials in the suit, but he did not have the power to make the policies for the state. If he had such powers he would be the state. *Id.* at 842.

3. By allowing the State to pursue a state law claim against the Pueblo, the Fifth Circuit has granted the State civil regulatory jurisdiction over gaming on the Pueblo's reservation in conflict with the clear language of section 1300g-6(b).

Congressional abrogation of tribal immunity is to be strictly construed. *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999). Any abrogation of immunity from suit is limited to the right of action created in section 1300g-6(c). Nothing in section 1300g-6 suggests that Congress has permitted state law claims be brought against Petitioners. In fact section 1300g-6(b) provides that nothing in section 1300g-6 shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas. Nonetheless, the Fifth Circuit is permitting the State to seek an injunction against the Petitioners under Chapter 125 of the Texas Civil Practices and Remedies Code (public and common nuisance). Tex. Civ. Prac. & Rem. Code Ann. § 125.001 *et seq.* Of course, allowing Texas to pursue state law claims in contravention of a Congressional directive otherwise destroys the careful balancing of federal, tribal, and state interests crafted by Congress in section 1300g-6.

CONCLUSION

Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Oct.31, 2000]

No. 00-50014

D.C. Docket No. EP-99-CV-320-H

STATE OF TEXAS

Plaintiff-Appellee

v.

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; FILBERT CANDELERIA, TRIBAL ACTING GOVERNOR; FRANCISCO HERNANDEZ, GAMING COMMISSIONER

Defendants - Appellants

Appeals from the United States District Court
for the Western District of Texas, El Paso.

Before DAVIS, EMILIO M. GARZA, Circuit Judges, and POGUE*, Judge.

J U D G M EN T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

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* Judge of the U.S. Court of International Trade, sitting by designation.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: Jan 03,2001

A true Copy
Test

/s/ Sabrina Barrax

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Oct 31, 2000]

No. 00-50014

STATE OF TEXAS,
Plaintiff-Appellee,

Versus

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; FILBERT CANDELARIA, TRIBAL ACTING GOVERNOR; FRANCISCO HERNANDEZ, GAMING COMMISSIONER;
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas, El Paso Division

Before DAVIS, EMILIO M. GARZA, Circuit Judges, and POGUE, Judge *

PER CURIAM:**

The State of Texas brought suit against Ysleta del Sur Pueblo (the "Tribe") seeking to enjoin the Tribe from violating Texas anti-gaming laws at its Speaking Rock Casino. The Tribe responded by filing a motion to dismiss

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* Judge of the U.S. Court of International Trade, sitting by designation.

** Pursuant to 5th CIR. R. 47. 5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

for lack of subject matter jurisdiction on the basis of tribal immunity. The District Court concluded that under the Restoration Act (25 U.S.C. § 1300g) tribal immunity as to the state's claims is unequivocally abrogated and waived. We AFFIRM.

This Court has previously addressed the history of the bargain struck between the Tribe, the State of Texas and Congress in the passage of the Restoration Act in *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994) ("Ysleta I"). Essentially, in order to obtain passage of the Restoration Act which provided for restoration of the federal trust relationship to the Tribe, the Tribe agreed and in fact requested that the act include language prohibiting all gaming prohibited under Texas state law. In *Ysleta I*, this court concluded that the Restoration Act governs the determination of whether gaming activities of the Tribe are allowed under Texas law, which operates as surrogate federal law on the reservation.

The Restoration Act at § 1300g-6 (a) clearly states that all gaming activities which are prohibited under the laws of the State of Texas are prohibited on the reservation. At § 1300g-6(c), the courts of the United States are recognized as having exclusive jurisdiction over any violation of the prohibition in subsection (a). The section also states that "nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section." Recognizing that suits against Indian tribes are barred by sovereign immunity in the absence of clear waiver by the Tribe or congressional abrogation, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991), we find that the Restoration Act represents a clear abrogation by Congress of the Tribe's immunity as to exactly the class of suit brought here—an action in the courts of the United States by the State

of Texas to enjoin violations of the anti-gaming provision of the act.

Accordingly, the district court's denial of the Tribe's motion to dismiss on the basis of its sovereign immunity was proper and the judgment of the district court is AFFIRMED. Because the only issue properly before us is the correctness of the district court's denial of immunity, other issues raised by the Tribe are not reviewable at this time.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Dec. 12, 2000]

No. 00-50014

STATE OF TEXAS
Plaintiff-Appellee,

v.

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; FILBERT CANDELERIA, TRIBAL ACTING GOVERNOR; FRANCISCO HERNANDEZ, GAMING COMMISSIONER
Defendants – Appellants.

Appeals from the United States District Court
for the Western District of Texas, El Paso

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 10/31/00, 5 Cir.___, ___,F.3d___)

Before DAVIS, EMILIO M. GARZA, Circuit Judges, and POGUE, Judge*.

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* Judge of the U.S. Court of International Trade, sitting by designation.

Judge Jones did not participate in the consideration of the petition for rehearing en banc.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. App. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. App. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible

UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF TEXAS

[Filed Dec 3, 1999]

No. EP-99-CA-320-H

STATE OF TEXAS

Plaintiff,

v.

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL ACTING GOVERNOR FILBERT CANDELERIA, and GAMING COMMISSIONER FRANCISCO HERNANDEZ

Defendants.

Dec. 3, 1999

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

This is the case that asks the question: can the State of Texas enjoin gambling activities taking place on an Indian reservation located within its borders?[1] On September 27, 1999, the Attorney General of the State of Texas ("AG") commenced this action to enjoin Defendants from operating a gaming facility called "Speaking Rock Casino," located on the Ysleta del Sur Pueblo Tribe ("Tribe") reservation. In response, the Defendants, a group which includes the Tribe itself along with two tribal officials and the Tribal Council,

[1] Certain forms of gambling are prohibited in Texas. *See* Tex. Pen. Code Ann. § 47.01 et seq.; *see also* Tex. Const. Art. 3 § 47(a) (directing state legislature to pass anti-gaming laws).

filed a motion to dismiss pursuant to Federal Rules of Civil Procedure ("F.R.C.P.") 12(b)(1), 12(b)(6), and 12(b)(7). On November 12, 1999, Plaintiff responded. This case is now ripe for decision.

A. Background

The members of the Tribe are descendants of Indians who fled from New Mexico in the Pueblo Revolt of 1680. *See* W.H. TIMMONS, EL PASO: A BORDERLANDS HISTORY 17-24 (1990). After following the defeated Spaniards south, the Indian refugees, composed of members of several tribes, settled near what is now San Elizario, Texas, and formed what came to be known as the Ysleta del Sur Pueblo. *See id.* Throughout the eighteenth and nineteenth centuries, the Tribe retained a kinship-based tribal government. *See id.* at 181. In 1895, the Tribe adopted a constitution and by-laws to protect its traditions and culture from "Mexicanization." *See id.* In 1967, the State of Texas recognized the Tribe, and established the present reservation. *See id.* at 260. The following year, the federal government also recognized the Tribe, but delegated all its administrative responsibilities to the State of Texas. *See Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1327 (5th Cir.1994) (*"Ysleta I"*).

In the mid-1980s, amidst concerns regarding the constitutionality of the arrangement, Congress established a new federal trust with the Tribe. *See Ysleta I*, 36 F.3d at 1327-28; Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. § 1300g *et seq.* (1987) ("Restoration Act"). The Restoration Act purported to prohibit gambling on the reservation by incorporating state law; however, the Tribe tried to compel Texas to negotiate a "Tribal-State compact" pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq. (1987). *See Ysleta del Sur Pueblo v. State of Texas*, 852 F.Supp. 587, 588-89 (W.D.Tex.1993). The Tribe hoped that an IGRA compact would result in federal authorization

of reservation gambling. The Fifth Circuit Court of Appeals ultimately resolved the question in favor of the State of Texas by holding that the Restoration Act, as opposed to IGRA, would govern the gambling question were a proper suit to arise. *See Ysleta I*, 36 F.3d at 1335-36.

Despite the implications of the Fifth Circuit's holding, the Speaking Rock Casino began operating in 1993. In 1998, however, the Tribe commenced a suit against the State of Texas for declaratory and injunctive relief to validate reservation gambling after the Governor of Texas opined that the Tribe was violating the Restoration Act. *See Ysleta del Sur Pueblo v. Bush*, No. P-98- CA-47, (W.D.Tex.Aug.7, 1998) ("*Ysleta II*"). The district court found that Texas had not waived its Eleventh Amendment immunity, and dismissed the case. *See id.* The Fifth Circuit affirmed, and the Tribe is now petitioning for a writ of certiorari from the United States Supreme Court. (Def. Mot. to Abate.)

Having also determined that activities at Speaking Rock were in violation of the Restoration Act, the AG commenced the instant lawsuit. In their motion to dismiss, Defendants raise the following claims: (1) Congress never waived the Tribe's sovereign immunity, (2) the United States must be joined as an indispensable party before the AG can proceed, and (3) the AG lacks capacity to sue the Tribe on behalf of the State of Texas.

B. Waiver of Sovereign Immunity

Defendants first argue that nothing in the Restoration Act constitutes a waiver of the Tribe's sovereign immunity. Alternatively, Defendants argue that the question of whether Plaintiff can bring suit should be governed by Public Law 280.[2] The Supreme Court has determined that Public Law

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[2] Public Law 280 is codified at 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a). *See* Pub.L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-89 (1953). Under Defendants' theory, some of the language of Public Law 280

280 does not constitute a waiver of tribal sovereign immunity. *See Three Affiliated Tribes of Fort Berthold Reserv. v. Wold Eng'g*, 476 U.S. 877, 892, 106 S.Ct. 2305, 2314 (1987). Consequently, Defendants maintain, under either theory the Tribe is immune from suit, and the action should be dismissed.

Indian tribes enjoy common-law immunity from suit traditionally enjoyed by sovereign powers. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978). Although tribes have the power to regulate internal matters, make their own substantive laws, and enforce laws in their own forums, Congress can "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *See id.* at 55-57, 98 S.Ct. at 1676-77 (citing *Talton v. Mayes*, 163 U.S. 376, 384, 16 S.Ct. 986, 989 (1896)). Consequently, Congress may waive tribal immunity, provided that the waiver is "unequivocally expressed." *See id.* at 58-59, 98 S.Ct. at 1677.

The Restoration Act provides that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." *See* 25 U.S.C. § 1300g-6(a). All civil and criminal penalties relating to illegal gambling under state law apply on the reservation, and Congress granted exclusive jurisdiction to federal courts over actions involving gaming violations on the reservation. See 25 U.S.C. § 1300g-6(a-c). Most importantly, the Restoration Act allows the State of Texas to

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mirrors provisions of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 et seq. (1968), even though the former statute applies only to certain tribes outside of Texas. Compare 28 U.S.C. § 1360 and 18 U.S.C. § 1162 with 25 U.S.C. §§ 1321-22. By contrast, ICRA applies to all federally-recognized tribes. *See* 25 U.S.C. § 1301. Hence, Defendants argue, Public Law 280 jurisprudence should apply to tribes in Texas through ICRA.

bring suit in federal court to enjoin any such violations. *See id.*[3]

The Court finds that § 1300g-6 does represent an unequivocal waiver of tribal immunity, and governs the sovereign immunity issue in this case. This holding is reached even though tribal immunity waivers are to be strictly construed, with all ambiguous provisions interpreted in favor of the tribe. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258 (1985); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403-04 (1985). In addition, the Court finds that Defendants' argument regarding Public Law 280 and the ICRA fails since Congress clearly intended to abrogate the Tribe's immunity for purposes of prohibiting gambling. The Restoration Act is an act related to specific tribes, and was passed almost twenty years after ICRA. *See Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2483 (1974) ("[Absent clear intent by Congress], a specific statute will not be controlled or nullified by a general one.") In addition, Public Law 280 does not apply to Texas tribes. More importantly, the Fifth Circuit Court of Appeals has made it clear that the analysis of gambling on the Tribe's reservation is to be governed exclusively by the Restoration Act. *See Ysleta I*, 36 F.3d 1325, 1332-35 (5th Cir.1994) ("the Restoration Act . . . and not IGRA would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law.") Moreover, the Fifth Circuit implicitly repudiated Public Law 280 jurisprudence in *Ysleta I*.[4] Furthermore, tribal immunity

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[3] The statute reads as follows: "[N]othing in this section shall be construed as precluding the *State of Texas* from bringing an action in the courts of the United States to enjoin violations of the provisions of this section." *See* 25 U.S.C. § 1300g-6(c) (emphasis added).

[4] The lower court determined that IGRA directed courts to adopt the analytical framework of the Supreme Court's ruling in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987) in

is not a defense to a claim for injunctive relief when brought against tribal officials and the Tribe itself. *See TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680-681 (5th Cir.1999);[5] *see also Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. at 1677. Thus, Plaintiff has established a prima facie basis to proceed.

C. Indispensable Party

Defendants' next argument is that the case should be dismissed, pursuant to F.R.C.P. 12(b)(7), unless the United States is joined as an indispensable party. Defendants claim that the United States may eventually bring its own action against the Tribe concerning the same gaming activities, even if Defendants prevail in this case; thus, the potential exists for "inconsistent obligations." (Def. Mot. at 9.) *See* F.R.C.P. 19(a)(ii). The cases cited by Defendants for the proposition that the United States must be joined in every suit involving a federally-recognized tribe are inapposite. The United States was never joined in *California v. Cabazon Band of Mission Indians*, nor did the Supreme Court express any opinion on joinder in that case. *See* 480 U.S. 202, 107 S.Ct. 1083 (1987). In *Carlson v. Tulalip Tribes of Washington*, the Tenth Circuit Court of Appeals held that the United States was an indispensable party only because that case involved a boundary dispute on lands to which the United States possessed fee title. *See* 510 F.2d 1337 (10th Cir.1975). In this case, federal law incorporates state law for purposes of gambling violations. *See Ysleta I*, 36 F.3d at 1335. Thus, legally there should be no inconsistent obligations, since the

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assessing reservation gambling questions. See *Ysleta De Sur Pueblo*, 852 F.Supp. at 593. *Cabazon* was a Public Law 280 case. Thus, by finding that the Restoration Act, and not IGRA, governed a dispute involving the Tribe, it implicitly rejected the "*Cabazon* /Public Law 280" framework. *See Ysleta I*, 36 F.3d at 1335.

[5] The suit in *TTEA* was brought against the Tribe, two tribal judges, and the Tribal Court.

causes of action are the same. Furthermore, the threat of multiple litigation does not, by itself, necessitate joinder. *See Boone v. General Motors Acceptance Corp.*, 682 F.2d 552, 554 (5th Cir.1982); *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir.1998). Accordingly, Defendant's Rule 12(b)(7) claim should be denied.

D. Capacity to Sue

Defendants' last contention is that the Attorney General lacks the capacity to sue on behalf of the State of Texas.[6] Defendants have met the requirement of F.R.C.P. 9(a) by raising the issue of capacity through "specific negative averment." *See* F.R.C.P. 9(a); 6A C. WRIGHT & A. MILLER FED. PRAC. & PROC. § 1559 (2nd ed. 1990) ("FED PRAC. & PROC."). In addressing a "capacity" claim, a Rule 12(b)(6) motion is favored, given that a court cannot grant relief to a party lacking capacity to sue. *See Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 296 (2nd Cir.1965); 5 FED. PRAC. & PROC. § 1294. Moreover, having determined that a tribal immunity defense is unavailable, and given that a capacity claim is generally non-jurisdictional, a 12(b)(1) motion is inappropriate. *See TTEA*, 181 F.3d at 680-81; *Brown v. Keller*, 274 F.2d 779, 780 (6th Cir.1960), *cert. denied*, 363 U.S. 828, 80 S.Ct. 1599 (1960) (characterizing capacity claim as non-jurisdictional); *Summers v. Interstate Tractor and Equip. Co.*, 466 F.2d 42, 50 (9th Cir.1972) (same). Consequently, the Court addresses Defendants' capacity claim only as a 12(b)(6) motion.

In analyzing a capacity claim, a federal court must defer to the law of the state in which it sits. *See* F.R.C.P. 17(b). State

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[6] "Lack of capacity" (i.e. a party's right to initiate a suit on behalf of another) should not be confused with "standing" insofar as standing refers to whether a party has a "personal stake in the outcome." *See generally Board of Educ. v. Illinois State Bd. of Educ.*, 810 F.2d 707, 709-10 n. 3 (7th Cir.1987).

law includes constitutions and statutes, as well as judicial decisions construing them. *See* 6A FED. PRAC. & PROC. § 1559; *Klebanow*, 344 F.2d at 297. Thus, the question whether a state attorney general has capacity to sue in a particular case is governed by state law. *See State of Fla. ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 269 (5th Cir.1976); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1057, 1058 (E.D.Pa.1969). Although at common law the office of attorney general was endowed with broad powers to act in the public interest, assessment of a state attorney general's power is a state-specific inquiry. *See Shevin*, 526 F.2d at 268-69. Thus, the Court must answer the question through reference to the "whole law" of the State of Texas. *See Klebanow*, 344 F.2d at 297; *cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938).

Unlike states such as Maryland, Pennsylvania, and Delaware, no constitutional or statutory provision in Texas grants the AG broad general powers to sue on behalf of the state whenever he or she believes that litigation would be in the public interest. *See Commonwealth of Pa. v. Mid-Atlantic Toyota Distrib.*, 704 F.2d 125, 129 n.7 (4th Cir.1983) (comparing attorneys general in aforementioned states with those in states such as Oklahoma where the office's broad common law authority was eliminated). The general duties of the AG are defined in one provision in the state constitution. *See* TEX. CONST. ART. IV § 21. The AG's powers are further defined in the Texas Government Code. *See* Tex. Gov't Code Ann. § 402.001 *et seq*. Although the AG has the power to "prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals," any admission, agreement, or waiver made by the AG "in a suit to which the state is a party does not prejudice the rights of the state." *See id.* §§ 401.021, 401.004.

More importantly, Texas courts have consistently held that the Texas AG is powerless to act in the absence of explicit statutory or constitutional authorization.[7] Those courts have repeatedly permitted the AG to sue provided that specific authorization could be found in a relevant act.[8] Similarly, they have dismissed actions in which the AG attempted to rely upon implied powers without express authority from the legislature.[9] To the extent that the courts have occasionally broadened the types of actions the AG may bring, or even implied a power to sue, the analysis stemmed from specific

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[7]See *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S.W. 865 (Tex.1887) (holding that in the absence of an express law, it would not imply authority from the AG's "general grants of power or imposition of duties . . . [because] in a government in which the duties of all officers, as well as their powers, are defined by written law, no power ought to be exercised for which warrant is not there found."); *Brady v. Brooks*, 99 Tex. 366, 89 S.W. 1052 (1905) (explaining that the framers of the state's constitution had intended to allow "the Legislature to impose upon the Attorney General duties in addition to those expressly defined [in the state constitution] to enable that body to provide that that officer should represent the state in any class of cases where his services should be deemed requisite.")

[8]*See Charles Scribner's Sons v. Marrs*, 114 Tex. 11, 27, 262 S.W. 722, 728 (Tex.1924); *Smith v. State*, 328 S.W.2d 294, 294-95 (Tex. 1959) (per curiam); *Baker v. Wade*, 743 F.2d 236, 242 (5th Cir.1984); *State ex rel. Cavanaugh v. Nelson*, 170 S.W. 814, 815 (Tex.Civ.App.—Amarillo, 1914, no writ).

[9]*See State ex rel. Downs v. Harney*, 164 S.W.2d 55, 56 (Tex.Civ.App.—San Antonio, 1942, writ ref'd w.o.m.) (determining that since the AG's powers could not be enlarged or restricted except in manner authorized by state constitution, AG lacked power to bring action to remove state officials); *Garcia v. Laughlin*, 285 S.W.2d 191, 194 (Tex. 1955) (affirming *Harney*); *State v. Reagan County Purchasing Co.*, 186 S.W.2d 128, 135 (Tex.Civ.App.—El Paso, 1944, writ ref'd w.o.m.) (finding that AG could not determine terms on which public domain could be sold since "acts beyond the scope of his delegated power are not binding on the state"); *Hill v. Tex. Water Quality Bd.*, 568 S.W.2d 738, 740-41 (Tex.Civ.App.—Austin, 1978, writ ref'd n.r.e.) (rejecting AG's "implied common law powers" argument).

statutory provisions, rather than an implied general common law power.[10] Perhaps most importantly, the state legislature has consistently included provisions in its statutes authorizing the AG to sue on the state's behalf whenever it determines that his or her skills are needed.[11] Thus, the "whole law" of Texas indicates that the AG must be given specific authorization in order to bring suit. Cf. *Charles Scribner's Sons*, 114 Tex. at 28, 262 S.W. at 728 ("Fixedness of responsibility is a necessity in government.")

In this case, the AG has cited no statute empowering him to sue the Defendants on behalf of the State of Texas, nor is any grant of authority found in the Texas Penal Code.[12] The AG's claim of authorization through his common law power must be rejected in light of the preceding discussion. Although the AG attempts to characterize § 1300g-6(c) of the Restoration Act as providing him with authority to sue, such a reading would in effect transform Congress into the Texas legislature. *See Mid-Atlantic Toyota*, 704 F.2d at 129 (recognizing that Congress could not redefine powers of state

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[10] *See, e.g., State of Texas v. Scott & Fetzer Co.*, 709 F.2d 1024, 1026 (5th Cir.1983) (determining that state statute allowing AG to recover damages for violation of federal antitrust law permitted him to bring *parens patrie* action); *Agey v. American Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (1943) (finding clearly implied authorization for AG to enforce civil penalty provision in specific act). Furthermore, to the extent that *Terrazas v. Ramirez* may or may not represent a departure from the general rule, that badly-fractured opinion represents only a small bump on an otherwise smooth jurisprudential plane. *See Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex.1991).

[11] See generally 7 TEX. JUR. 3D § 13 (1980) (listing AG's litigation duties as specified in diverse statutes); *State v. Thomas*, 766 S.W.2d 217, 220 (Tex.1989) (same).

[12] *See* Tex. Pen. Code Ann. § 47.01 et seq.; *see also Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 298 (Tex.App.—Austin, 1996, no writ) (noting that authority to enforce Penal Code is vested exclusively in district and county attorneys, and that AG cannot initiate prosecutions.).

attorney generals); *cf. New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992) (holding that Congress cannot force state executive officials to enact or administer federal programs). The statute should instead be construed to give the State of Texas the option to enforce its anti-gaming laws in federal court, in accordance with state law. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, (1988) (directing courts to construe statutes to avoid constitutional problems). The burden of proof rests with the AG to identify a source of power authorizing him to exercise this option on behalf of the state. *See Day Land & Cattle*, 68 Tex. at 533-34, 4 S.W. at 867. Thus far, the AG has not met his burden.

Nonetheless, given the competing policy interests in this case, and in light of the fact that dismissal is generally disfavored under the Federal Rules, the Court will afford the AG an opportunity to amend his complaint to properly demonstrate his source of authority, under Texas law, to bring this suit.[13]

It is therefore ORDERED that the Attorney General of the State of Texas file an amended complaint within ten (10) days of the date of this order, specifying the source of his authority under Texas law to enjoin gambling operations. If the Attorney General fails to amend the complaint accordingly within the time specified, Defendants' motion to dismiss under F.R.C.P. 12(b)(6) for lack of capacity will be granted.

It is further ORDERED that in all other respects Defendants' motion to dismiss in the above-styled and numbered cause be, and it is hereby, DENIED.

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[13] Arguably, the AG could characterize Speaking Rock as a "common nuisance" since it appears to be "a place to which persons habitually go for the purpose of . . . gambling in violation of the Texas Penal Code." *See* Tex. Civ. Prac. & Rem. Code § 125.001. The AG has authority to bring suit to abate or enjoin such a nuisance. *See id.* § 125.002. On their face, these statutes appear to confer the necessary authority

Signed And Entered this 2nd day of December, 1999.

/s/ Harry Lee Hudspeth
Harry Lee Hudspeth
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
[Filed Jan 13 2000]

No. EP-99-CA-320-H

STATE OF TEXAS,

Plaintiff,

v.

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL ACTING GOVERNOR FILBERT CANDELERIA, AND GAMING COMMISSIONER FRANCISCO HERNANDEZ,

Defendants.

ORDER DENYING DEFENDANTS' SECOND MOTION TO DISMISS OR, IN THE ALTERNATIVE, REQUEST FOR CERTIFICATE OF APPEALABILITY

This is an action for injunctive relief brought by the Attorney General of the State of Texas ("AG") to enjoin Defendants from operating a gaming facility called "Speaking Rock Casino," located on the Ysleta del Sur Pueblo Tribe ("Tribe") reservation. The background of this case is found in the Court's order of December 3, 1999. *See State v. Ysleta del Sur Pueblo*, 1999 WL 1211427 (W.D.Tex. 1999) ("Ysleta III"). In that order, the Court directed the AG to file an amended complaint alleging constitutional or statutory authority under state law to bring suit against Defendants. On December 16, 1999, the AG filed a first amended complaint alleging capacity to bring suit in the name of the State of Texas to enjoin and abate a public nuisance. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 125.001-002 (Vernon's 1997)

"Civil Practice Code").[1] On December 23, 1999, the Court ordered Defendants to answer the complaint by January 15, 2000. On December 23, 1999, Defendants filed a notice of appeal of the Court's order of December 3, 1999 to the Fifth Circuit Court of Appeals. On January 7, 2000, Defendants filed the present motion in which they ask the Court to dismiss this case under Rules12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[2] In the alternative, Defendants request the issuance of a certificate of appealability under 28 U.S.C. § 1292(b). This matter is now ripe for decision.

A. Application of State Law Under Restoration Act

Defendants request dismissal of this case for lack of subject matter jurisdiction or failure to state a claim on the basis that sections 125.001 and 125.002 of the Civil Practice Code form part of a state regulatory scheme. Under section 107(b) of the Restoration Act,[3] the State of Texas has no

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[1] The statutes allow the AG to enjoin several public nuisances, including the "use of any place for . . . (1) gambling, gambling promotion, or communicating gambling information prohibited by law[.]" *See* Tex. Civ. Prac. & Rem. Code Ann. §125.021.

[2] In addition to the "new" 12(b)(6) and 12(b)(1) motion, Defendants also "reassert" their prior motion to dismiss for lack of subject matter jurisdiction and failure to join an indispensable party. The Fifth Circuit has held that parties do not waive their right to appeal an order dismissing claims by failing to raise the issues in a subsequent motion. *See Wilson v. First Houston Investment Corp.*, 566 F.2d 1235, 1237-1238 (5th Cir. 1978), *vacated on other grounds* 444 U.S. 959, 100 S.Ct. 442; *see also* 6 A. WRIGHT & C. MILLER, 6 FED. PRAC. & PROC. §1476 (2nd ed. 1990). Nonetheless, Defendants have decided to "play it safe" by ensuring that the dismissed claims are preserved for appeal. Accordingly, the Court "redismisses" the previous claims.

[3] *See* Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, §107(b), 101 Stat. 666, 668 (1987) (located at 25 U.S.C. §1300g-6(b)).

general civil or regulatory jurisdiction over the reservation; therefore, Defendants argue, the state public nuisance laws cannot apply on their reservation.

A brief review of the statutory scheme illustrates the flaw in Defendants' reasoning. Section 107(a) of the Restoration Act provides that all gambling activities prohibited under Texas law are also prohibited on the reservation. *See* 25 U.S.C. §1300g-6(a) . Thus any state gambling law becomes federal law for purposes of reservation gambling. *See Yselta del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994), cert. denied, 514 U.S. 1016, 115 S.Ct. 1358 (1995) ("Ysleta I") ("Texas law . . . functions as surrogate federal law.") The reference in section 107(a) makes clear that "state law" encompasses both civil and criminal statutes. *See* 25 U.S.C. § 1300g-6(a). Although federal courts maintain exclusive jurisdiction over cases involving violations of 107(a), Congress empowered the State of Texas to sue in federal court to enforce the civil and criminal provisions through an injunction. *See* 25 U.S.C. §1300g-6(c).[4] The only other provision in the Restoration Act pertaining to gambling provides that "[n]othing in [the gambling] section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas. *See* 25 U.S.C. § 1300g-6(b).[5] Thus, the plain wording of sections 107(a) and (c)

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[4] Moreover, other courts have determined that Congress is within its power in making state civil and criminal gambling laws applicable in Indian country. *See United States v. Santa Ynez Band of Chumash Mission Indians*, 983 F. Supp. 1317, 1324 (C.D.Cal. 1997) (applying 18 U.S.C. §1166(a) which incorporates state civil gambling provisions into federal law); *United States v. E.C. Investments, Inc.*, 77 F.3d 327, 331 (9th Cir. 1996) (addressing 18 U.S.C. §1955 which does the same for criminal statutes).

[5] Section 1300g-6(b) appears to have been derived from two United States Supreme Court opinions. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987); B*ryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 96 S.Ct. 2102 (1976). Although the

evince Congress' s clear intent to limit the Tribe's sovereign immunity by allowing the State of Texas to enjoin reservation gambling using state anti-gaming laws. *Accord Ysleta I*, 36 F.3d 1327-29 (reviewing legislative history of Restoration Act); *Ysleta III*, 1999 WL 1211427 at 2 (rejecting sovereign immunity defense).

Undeniably, sections 125.021 and 125.022 of the Civil Practice Code are state laws pertaining to gambling. In addition, there is no issue here regarding the propriety of using an injunction to stop a criminal violation. Courts may enjoin a potential criminal violation only (1) in cases of national emergency; (2) in cases involving a public nuisance; or (3) in cases where a statute grants a court the power to enjoin a crime. *See United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 565 (8th Cir. 1998), cert. denied, 119 S.Ct. 48 (1998). In this case, there is (1) a statute defining as a public nuisance an establishment where state gambling laws are violated; and (2) federal and state statutes authorizing injunctions against state gambling law infractions. Furthermore, as the Eighth Circuit Court of Appeals has made clear, federal courts should employ state remedies (and hence state injunction procedures) to enforce "surrogate" federal gambling laws against tribes. *See id.* (determining that where Nebraska case law provided for injunctive relief against violations of state gaming laws, federal court was required to enforce "surrogate" federal statute with reference to state law remedy).

Supreme Court in those cases determined that Public Law 280 (18 U.S.C. §1162) did not grant to certain states general civil regulatory authority over tribal reservations, it also held that such authority could be granted where expressly provided by Congress. *See Cabazon*, 480 U.S. at 214-15, 107 S.Ct. at 1091; *Bryan*, 426 U.S. at 383-85, 96 S.Ct. at 2108-09. These cases reinforce the notion that Congress's grant to the State of Texas to exercise regulatory authority over gambling on the Tribe's reservation was valid. *See Cabazon*, 480 U.S. at 207, 107 S.Ct. at 1087 (discussing plenary powers of Congress over tribes).

Defendants nonetheless believe that inasmuch as the Civil Practice Code classifies as nuisances prostitution, certain forms of nude dancing, bullfighting, and discharging a firearm in a public place, in addition to gambling, its application here would effectively grant to the State of Texas general civil regulatory jurisdiction over the Tribe, in violation of the Restoration Act. *See* Tex. Civ. Prac & Rem. Code Ann. § 125.001 (listing nuisances). The flaw with this argument is apparent. Hypothetically, if bullfighting was permitted under Tribal law, and the AG was trying to enjoin a matador from entering the reservation bullfighting ring based on state public nuisance law, section 107(b) would come into play. Moreover, the AG in such a case would unlawfully be using a law related to gambling to expand its regulatory jurisdiction over activities for which the Restoration Act expresses no concern. In this case, by contrast, the AG is only using the Civil Practice Code provisions as they pertain to gambling. Under the Restoration Act, these provisions function as federal laws; they empower the AG, as the representative of the State of Texas, to bring a suit in federal court to enjoin gambling on the reservation. *See* 28 U.S.C. § 1300g-6 (a) and (c). Consequently, the motion to dismiss under Rules 12(b)(1) and 12(b)(6) should be denied.

B. Lack of Capacity

Defendants' newest incarnation of its lack of capacity claim is premised on the notion that both state and federal law must explicitly empower the AG to bring suit on behalf of the State of Texas. This argument stems from Defendants' reading of *State of Texas v. Scott & Fetzer Co.*, a case concerning whether the AG was authorized under state law to bring a *parens patriae* action to recover for violations of federal antitrust law. *See* 709 F.2d 1024, 1024-25 (5th Cir. 1983). The federal statute at issue in *Scott & Fetzer* authorized the AG to bring a *parens patriae* action on behalf of the state, provided that the AG was not prohibited from

doing so under state law. *See id.* at 1025. The defendants argued that since the state law authorizing the AG to bring antitrust suits on behalf of the state did not specifically mention *parens patriae* actions, the AG lacked capacity to sue. *See id.* at 1025-26. The majority determined that the state law implicitly authorized *parens patriae* actions; the dissenting judge thought otherwise. *See id.* at 1027, 1029-30. As Defendants read *Scott & Fetzer,* where Congress allows a state attorney general to bring a suit based on state law, the state statute must (a) name a specific defendant (or at least a general category of defendants, such as "federal antitrust law violators"), and (b) authorize the filing of a lawsuit alleging a federal cause of action.

Defendants' contortion of *Scott & Fetzer*, fails for several reasons. First, the state statute at issue in that case did not specifically identify a class of defendants; it simply allowed the AG to recover "damages provided for by the federal antitrust laws." *See* Tex. Bus. & Com. Code Ann. § 15.40 (Vernon's 1987). Rather, the AG could sue any party who violated federal antitrust laws; similarly, the Civil Practice Code authorizes the AG to sue anyone who runs a gambling casino within the state. Second, Defendants have cited no authority in support of the proposition that the state law allowing the AG to enjoin gambling must specifically refer to the Tribe or its reservation. The Restoration Act allows such suits, and only Congress can waive the Tribe's sovereign immunity; thus, there is no need for the State of Texas to also pass a statute authorizing suits against these particular Defendants. Similarly, the state is not obligated to amend its public nuisance statute to specifically mention the federal cause of action; the Restoration Act solves the problem by "federalizing" all state anti-gaming law. *See* 25 U.S.C. §1300g-6(a). Accordingly, the motion to dismiss for lack of capacity should be denied.

C. Certificate Of Appealability Request

Although Defendants have already "jumped the gun" by appealing the Court's ruling on the AG's capacity to sue, they now ask the Court, pursuant to 28 U.S.C. § 1292(b), to certify this issue for an interlocutory appeal. A Court may certify an issue if it involves a controlling question of law for which there is substantial ground for difference of opinion, and if disposition of the issue by the court of appeals might advance the ultimate termination of the litigation. *See* 28 U.S.C. 1292(b).

The Court finds that the request should be denied. Although the lack of capacity issue is a controlling question of law, Defendants have failed to show that there exists a substantial ground for difference of opinion. *See* C. WRIGHT A. MILLER & E. COOPER, 16 FED. PRAC. & PROC. § 3930 (2nd ed. 1996) (noting that a "matter of first impression" is not synonymous with a "substantial ground"). Neither of the Fifth circuit cases cited by Defendants show that a substantial ground for difference of opinion on the capacity issue exists under these circumstances.[6] Moreover, the only real

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[6] The cases cited include *Scott & Fetzer* and League of *United Latin Amer. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc) ("LULAC IV"). In *Scott & Fetzer*, Judge Jolly's dissent focused on the fact that the state as a political entity was not the beneficiary of a *parens patriae* action, and that as such the majority had conferred authority on the AG to act where none had been given by the state legislature. *See Scott & Fetzer*, 709 F.2d 1029. In *LULAC IV*, the majority of circuit judges found that the AG lacked power to make policy for the State of Texas; accordingly, the AG could not ignore the wishes of the other state parties he represented by settling an important apportionment case instead of proceeding with the appeal. *See LULAC IV*, 999 F.2d at 840-843. Four dissenting circuit judges argued that the AG had broad common law authority to act on behalf of the state, and could accordingly halt the appeal. *See id.* At 899, 921-925. The dissent based its conclusions on *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991), a case in which no clear ruling emerged on whether the AG possessed implied common law power to sue on behalf of the state. *See id.*

controversy over the AG's capacity in past cases involved extensions of the scope of certain statutes and constitutional provisions authorizing the AG to sue on the state's behalf. *See, e.g., Scott & Fetzer*, 709 F.2d at 1024. In this case, the federal and state statutes are clear; no ambiguity in wording calls into question the AG's capacity to bring this suit. *See Singh v. Daimler-Benz, AG*, 800 F.Supp. 260, 263 (E.D.Pa. 1992), *aff'd*, 9 F.3d 303 (3rd Cir. 1993) (denying certification where language in disputed statute was clear). More importantly, in the likely event that the Fifth Circuit found the AG had capacity to sue, whether based on common law authority or the Civil Practice Code, the litigation will be considerably delayed by the appeals process, rather than advanced. *See id.* It is time to move away from the capacity question, and begin the next stage of litigation.

It is therefore ORDERED that Defendants' motion to dismiss in all respects be, and it is hereby, DENIED.

It is further ORDERED that Defendants' request for a certificate of appealability under 28 U.S.C. §1292 (b) be, and it is hereby, DENIED.

SIGNED AND ENTERED this 13th day of January, 2000.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States District Judge

APPENDIX F

STATUTES INVOLVED

25 U.S.C. § 1300g-4(f)

Sec. 1300g-4. Provisions relating to tribal reservation

* * * *

(f) Civil and criminal jurisdiction within reservation

The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 of this title.

* * * *

25 U.S.C. § 1300g-6

Sec. 1300g-6. Gaming activities

(a) In general

All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) No State regulatory jurisdiction

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members

Notwithstanding section 1300g-4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any

offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL NO. P 93 CA 029

YSLETA DEL SUR PUEBLO,
Plaintiff,

v.

STATE OF TEXAS and ANN RICHARDS,
GOVERNOR OF THE STATE OF TEXAS.
Defendants.

AFFIDAVIT OF MIGUEL PEDRAZA

THE STATE OF TEXAS
KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF EL PASO

BEFORE ME, the undersigned Notary Public, on this date personally appeared MIGUEL PEDRAZA, who being by me duly sworn upon his oath, deposed as follows:

My name is MIGUEL PEDRAZA. I am competent to make this affidavit. Every statement herein is within my personal knowledge and is true and correct.

I am a member of the Ysleta del Sur Pueblo. I am the Census Director for the Ysleta del Sur Pueblo. I have in my possession, custody, and control, the census records of the Pueblo. The information contained in this affidavit is compiled from such records.

The Ysleta del Sur Pueblo is located approximately 15 miles southeast of Downtown El Paso, and is within walking distance of the border between the United States and the Republic of Mexico. Pueblo realty totals 28.7 developed acres in non-contiguous locations used for housing and tribal administrative purposes, and another 37.3 acres of non-developed desert land. Tribal membership is 1,284 persons. The Tribe is governed under a traditional Pueblo system with a nine member tribal council, which consists of the Cacique, Governor, Lieutenant Governor, War Captain, Aguacil, and four councilmen at large.

On August 18, 1987, the United States Congress passed PL 100-89, which provided for the restoration of the federal trust relationship and the federal services in assistance to the Pueblo.

A 1993 census analysis indicates that 945 tribal members live within the immediate service area of the Pueblo and 339 tribal members live outside El Paso and Hudspeth County, Texas. These numbers do not include the number of non-eligible housing project and surrounding neighborhood residents that do not meet the 1/8th blood quantum necessary for tribal membership. As of March 17, 1993, 636 females compromise 50% of the total tribal population with the remaining 50% comprised of 634 males.

In March of this year, I and Census Officer Elias Torrez performed an income analysis of tribal membership. Sixty-eight percent of the heads of household have less than $15,000 in annual income, with and additional 16% receiving less than $5,000 annually. Only 1.5% of the head of households earn an annual income greater than $30,000.

Further, Affiant saith naught.

/s/ Miguel Pedraza
MIGUEL PEDRAZA

SUBSCRIBED AND SWORN TO BEFORE ME on this the 21st day of July, 1993, to certify which witness my hand and official seal.

/s/ Illegible
Notary Public
State of Texas

My Commission Expires:
2-11-95

APPENDIX H

[El Paso Times Monday, March 5, 2001]

Our Views

Tiguas gain momentum

House committee favors tribal casinos

Texas Attorney General John Cornyn maintains that, according to Texas law, Speaking Rock Casino in El Paso is an illegal gaming operation.

So, the attorney general is doing his job, following the law as his office interprets it, and is suing to shut down the Tiguas.

Fortunately, the legalization of gambling at Speaking Rock and two other Native American reservations in Texas now appears to be a real possibility.

In a move that looks promising for the Tiguas—and El Paso—a Texas House committee voted last week in favor of legislation that would legalize gaming at Speaking Rock. With any luck, this might spell the beginning of the end for the divisive, bitter and counterproductive fighting that's been going on for nearly a decade between the Tiguas and the state.

Speaking Rock has proved to be a boon to the Tiguas and El Paso. It attracts people to an area where few people would otherwise go. It has helped to boost interest in the Lower Valley and Mission Trail area. It has contributed big bucks to the El Paso economy; the casino generates about $60 million in revenues per year.

And possibly most important, Speaking Rock has improve the quality of life for the Tiguas. Tigua Gov. Albert Alvidrez told the committee that joblessness has virtually vanished

from the 1,254-member tribe, and that the casino has helped the Tiguas to overcome poverty and a sense of hopelessness.

Cornyn has been doing the right thing—following the law. And he's doing the right thing now—reviewing the Indian gaming bill and deciding what it's going to mean to the state's legal pursuit of the Tiguas. It's to be hoped that Cornyn keeps doing the right thing and drops the suit. The Tiguas need to be able to operate without the cloud of legal action hanging over them.

An important thing to notice about the Indian gaming bill is that it is not a blanket acceptance of casino-type gambling for Texas. Those who are worried, and with some good reason, about the moral implications of the gambling needn't worry that a casino will spring up in every town.

The measure applies only to the Tiguas, the Kickapoos in Maverick County and the Alabama-Coushatta tribe of Polk County—and only on their existing reservations. In that light, according to the bill's authors, it is actually anti-gambling-proliferation because its focus is so narrow.

At this time there appears to be no organized opposition to the legislation. The House and Senate appear friendly toward the bill. The benefits far outweigh any drawbacks. The El Paso businesses community is behind the bill.

The House and Senate should pass the Indian gambling bill as expeditiously as possible.

Supreme Court, U.S.
FILED
MAY 2 2001
OFFICE OF THE CLERK

(2)

No. 00-1413

In the Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *ET AL.*,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 00-1413

In the Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *ET AL.*,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of Texas, submits this brief in opposition to the petition for writ of certiorari filed by the Ysleta del Sur Pueblo Indian Tribe, the Tigua Gaming Agency, the Tigua Tribal Council, Acting Tribal Governor Filbert Candelaria, and Gaming Commissioner Francisco Hernandez (collectively "the Tribe"). The Fifth Circuit resolved this case with a straightforward application of the canons of statutory construction, and the case does not warrant the Court's review.

In 1999, the State sued the Tribe in federal court, seeking to enjoin illegal gambling operations at the Tribe's Speaking Rock Casino in El Paso, Texas. In response, the Tribe filed a motion to dismiss for lack of jurisdiction based on its tribal immunity from suit. In an unpublished, *per curiam* opinion, the Fifth Circuit affirmed the district court's determination

that Congress unequivocally abrogated and the Tribe clearly waived its immunity as part of "the bargain struck between the Tribe, the State of Texas, and Congress in the passage of the Restoration Act." *Texas v. Ysleta del Sur Pueblo*, No. 00-50014 (CA5 Oct. 31, 2000) (per curiam); *see* 25 U.S.C. §1300g; *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1327-29 (CA5 1994) (*Ysleta I*).

STATEMENT OF FACTS

In August of 1987, Congress granted federal tribal status to the Ysleta del Sur Pueblo by passing the Restoration of Federal Supervision Act (the "Restoration Act"). *See* 25 U.S.C. §1300g. Before enactment of the Restoration Act, however, various Texas state officials were concerned that the Act did not protect against the Tribe running "high stakes" gaming operations on the reservation. In exchange for passage of the Restoration Act, the Tribe adopted Tribal Resolution No. T.C.-02-86, stating that the Tribe had "no interest in conducting high stakes bingo or other gambling operations on its reservation," and that the Tribe "remains firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation." *See Ysleta I*, 36 F.3d at 1328 n.2; *id.* at 1327-30 (recounting the legislative history of the Act, including the Tribe's accommodations and promises made in order to secure passage of the Act).

In accordance with the Tribe's resolution, Congress enacted §1300g-6(a) of the Restoration Act, prohibiting gaming activities on the reservation that are prohibited by Texas law:

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on

> the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas.

25 U.S.C. §1300g-6(a). Thus, under §1300g-6(a), Texas gaming laws operate as surrogate federal law with respect to gaming on the Tribe's reservation. Accordingly, the Restoration Act—not the Indian Gaming Regulatory Act (IGRA)—governs gambling on this reservation. *See Ysleta I*, 36 F.3d at 1335. In addition, Congress authorized the State to enforce §1300g-6(a) and bring suit in federal court to enjoin any gaming violation by the Tribe:

> [T]he courts of the United Sates shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

25 U.S.C. §1300g-6(c).

Despite its commitments in the tribal resolution and the bargain struck with the State and Congress, the Tribe opened the Speaking Rock Casino on its reservation in El Paso County, Texas, in 1993. App. 10a. The casino operates high stakes gambling, including poker, bingo, keno, slot machines, and blackjack. R.97-100. These games are prohibited by the

Texas Penal Code and the public policy of the State. *See* TEX. PEN. CODE §§47.01-.04, .06.

In September 1999, the State filed suit to enjoin the Tribe from operating the casino in violation of Texas and federal law. R.1-16. The Tribe filed a motion to dismiss, arguing that it retained tribal immunity from suit. The Tribe also argued that the Attorney General lacked the capacity to sue the Tribe. R.17-28. The district court denied the motion to dismiss but ordered the State to amend its pleading to include a statute specifically granting the Attorney General authority to bring a claim to enjoin gaming activities. R.81-93; App. 14a-18a. The State then filed an amended complaint, identifying the Attorney General's authority to enjoin common nuisances such as "gambling in violation of the Penal Code" under the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE §125.001(a)(1), .002(a), .021(1); R.94-107.

The Tribe filed a second motion to dismiss, and the district court overruled the motion, concluding §1300g-6 is an unambiguous waiver of the Tribe's immunity. *See Texas v. Ysleta del Sur Pueblo*, 79 F.Supp.2d 708, 711 (W.D. Tex. 1999). The Fifth Circuit affirmed. App. 3a-5a.[1]

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1. The Tribe's suggestion that the State approved of Class II gaming and "offered to negotiate a contract for Class III lottery and pari-mutuel racing," Pet. at 4, is not relevant to the issue presented to the Court and is not supported by the record on appeal. *See* SUP. CT. R. 15(2).

SUMMARY OF THE ARGUMENT

In return for designation as a federally recognized Indian tribe, the Tribe agreed to congressional abrogation of its tribal immunity for violations of Texas gaming laws. The Speaking Rock Casino now operates in violation of Texas gaming laws, and the Restoration Act permits the State to maintain this action to enjoin the illegal activity. Unwilling to live up to the agreement it made with Congress and the State of Texas, the Tribe strives to make unclear what is perfectly clear—the Restoration Act controls this case and unambiguously waives the Tribe's immunity.

The Tribe has no logical argument to explain why the clear language of the Restoration Act does not do exactly what it says. Their only rebuttal is that a general statutory grant controls over a specific statutory grant—an incorrect statement of the canons of statutory construction that, even if correct, would not achieve their hoped-for result. Additionally, the Tribe's convoluted argument that the Texas Attorney General lacks the capacity to bring this suit is (1) not properly before this Court and (2) incorrect.

The Restoration Act is plain. The State may seek injunctive relief against gaming activities that violate Texas law. That is precisely what the State is attempting to do through this action. Not only was the Fifth Circuit correct in its resolution of this case, but the Tribe has given the Court no compelling reason to exercise its discretion and grant review of this case. Certiorari should be denied.

ARGUMENT

I. THE TRIBE HAS PRESENTED NO REASON FOR THIS COURT TO EXERCISE ITS DISCRETION AND REVIEW THIS CASE.

The Tribe has presented no compelling reason to grant the petition for writ of certiorari. The Fifth Circuit's decision neither conflicts with decisions of other state or federal courts, nor does it decide an important question of federal law that should be decided by the Court. *See* SUP. CT. R. 10(a), (c). In fact, unlike the provisions of the IGRA, §1300g-6 of the Restoration Act only applies to one tribe—the Ysleta del Sur Pueblo. This case would have very little, if any, precedential value beyond the litigants in this unusual case. The Court should not exercise its extraordinary, discretionary review.

II. THE RESTORATION ACT EXPRESSLY ABROGATES THE TRIBE'S IMMUNITY FROM SUIT.

Suits against Indian tribes are barred in the absence of a clear waiver of immunity by the tribe or congressional abrogation of tribal immunity. *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). The Tribe contends that §1300g-6 of the Restoration Act is not an express waiver of its immunity. However, in enacting §1300g-6, Congress unambiguously abrogated the Tribe's immunity from suits brought by the State to enjoin illegal gaming activities by the Tribe. *See Ysleta I*, 36 F.3d at 1333.

As the Fifth Circuit explained, the history of the "bargain struck between the Tribe, the State of Texas and Congress in the passage of the Restoration Act" explains why Congress

expressly abrogated the Tribe's immunity. In 1985, when the Tribe sought passage of a bill to restore its federal trust status, the Texas congressional delegation initially raised concerns that the bill as then drafted would permit high stakes gambling operations otherwise banned under Texas law. *See id.* at 1327.

In response, the Tribe approved Tribal Resolution No. TC-02-86. *Id.* at 1327-28. The Resolution provided that the Tribe "had no interest in conducting high stakes bingo or other gambling operations on its reservation, *regardless of whether such activities would be governed by tribal law, state law or federal law*." *See id.* at 1328 n.2 (emphasis added). Although the Tribe found application of state laws on the Tribe's reservation "to be wholly unsatisfactory," "a substantial infringement upon the Tribes' power of self government," and a "singling out [of] the Texas Tribes for treatment different than that accorded other Tribes in the country," the Tribe firmly "believed that the controversy over gaming must not be permitted to jeopardize this important legislation." *Id.* Therefore, to assuage these concerns and clear the way to obtaining tribal status, the Tribe asked the Texas congressional delegation to amend the Restoration Act to include "language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." *Id.* at 1328-29 & n.2.

Congress granted the Tribe's request. Tracking the text of the tribal resolution, the Restoration Act provides that "all gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands

of the tribe." 25 U.S.C. §1300g-6(a). Congress explicitly abrogated the Tribe's sovereign immunity to suit in federal court brought by the State to enjoin violations of Texas's gambling laws. *See* 25 U.S.C. §1300g-6(c). The clear language of the statute expressly gives the State the right to bring this lawsuit.

III. THE TRIBE'S INTERPRETATION OF §1300g-6 AND §1300g-4(f) IS UNREASONABLE.

The Tribe suggests that Congress enacted the Restoration Act as a statute generally applicable to the Tribe—like Public Law 280—without using the definitive language necessary to show congressional intent to abolish the Tribe's immunity or to subject the Tribe to suit under the Act. *See* Pet. at 3, 7-8.

In particular, the Tribe claims §1300g-6 is fairly susceptible to an alternative interpretation, based in part on §1300g-4(f), that avoids the conclusion that Congress intended to waive tribal immunity. Section 1300g-4(f) provides:

> The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 . . . .

25 U.S.C. §1300g-4(f). Under this subsection, the State exercises limited civil and criminal jurisdiction similar to the authority conferred on certain other states under Public Law 280. *See TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 685 (CA5 1999). According to the Tribe, Congress enacted §1300g-6 as a *limitation* on the civil jurisdiction granted in

§1300g-4(f) with respect to gaming activities. *See* Pet. at 3. Thus, the Tribe concludes that §1300g-6 is necessarily lesser than the grant of civil jurisdiction under Public Law 280. Because the Tribe believes that Public Law 280 would not confer jurisdiction over its gaming activity, the Tribe argues that the lesser jurisdiction conferred to the State in §1300g-6 could not confer jurisdiction over the Tribe's gaming activity. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208-09 (1987).[2] According to the Tribe, Congress only enacted §1300g-6 to permit the State to seek injunctive relief against tribes (other than the Ysleta del Sur Pueblo) "over whom the state would have had jurisdiction under section 1300g-4(f) if Congress had not preempted such jurisdiction under section 1300g-6(a)." Pet. at 8. The Tribe concludes that, given this "reasonable interpretation," §1300g-6 cannot be interpreted as an unambiguous waiver of tribal immunity.

However, the Tribe's tortured interpretation of the Restoration Act is wholly unreasonable. First, it is absurd to

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2. Even if the *Cabazon Band* test from Public Law 280 applied in this case (and it does not), the Tribe's gaming activities would nevertheless be prohibited under Public Law 280 because they violate the public policy of Texas. Unlike the bingo regulated by California in *Cabazon Band*, Chapter 47 of the Texas Penal Code and the public policy of Texas clearly prohibit the casino-style gaming conducted by the Tribe on the reservation. *See* TEX. PEN. CODE §47.01, *et seq.*; TEX. CONST. art 3, §47(a). This case involves statutes that are "criminal in nature" (as well as conduct that violates the law and public policy of Texas) and thus Texas law would be fully applicable to the Tribe even under Public Law 280. *See Cabazon Band*, 480 U.S. at 208-09. The Public Law 280-*Cabazon Band* argument is a red herring.

suggest that Congress enacted §1300g-6 to permit the State to seek injunctive relief in federal court against tribes *other than* the Ysleta del Sur Pueblo. Section 1300g-6 is codified in the subchapter entitled "Ysleta del Sur Pueblo: Restoration of Federal Supervision," and the term "tribe" is expressly defined as "the Ysleta del Sur Pueblo." 25 U.S.C. §1300g(1). Indeed, the opposite is true. Section 1300g-6(c) only grants the State the authority to seek relief in federal court for illegal gaming operations by the Ysleta del Sur Pueblo—not any other tribe.

Moreover, it is a canon of statutory construction that specific provisions govern over general provisions. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). The Tribe's alternative interpretation stands this principle on its head. Indeed, the Tribe bases its entire argument on the erroneous premise that the general grant of civil and criminal jurisdiction in §1300g-4(f) limits the express provision regarding the Tribe's gaming activity in §1300g-6. Under the well-established rules of statutory construction, §1300g-6 grants the State the right to seek injunctive relief in federal court for illegal gaming activity by the Tribe, and §1300g-4(f) defines the State's authority to assert its general civil and criminal jurisdiction over the Tribe and members of the Tribe in all other circumstances. The Tribe's "§1300g-6 limitation" argument is flat wrong.

In reality, the Tribe simply renews its past attempts to bootstrap the *Cabazon Band* test from Public Law 280 into Restoration Act cases. However, as the Fifth Circuit properly concluded in *Ysleta I*, "Congress did not enact the Restoration Act with an eye towards *Cabazon Band*." *See Ysleta I*, 36 F.3d at 1334.

IV. THE CAPACITY-TO-SUE ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT.

Under its alternative, conditional-abrogation theory, the Tribe contends that even if §1300g-6 is an express wavier of tribal immunity, the waiver must be strictly construed. Even though the Tribe recognizes that the "Fifth Circuit did not address the conditional-abrogation theory," Pet. at 7, the Tribe claims the Texas Legislature—not the Attorney General of Texas—is the only party specifically authorized to invoke the waiver. *See* Pet at 11-12. In addition, the Tribe claims the State's reliance on §125.001 and §125.002 of the Civil Practice and Remedies Code—authorizing the Attorney General to sue to enjoin public nuisances such as gambling—is an independent state law claim against the Tribe in violation of the limited waiver in §1300g-6. *See* Pet. at 13.

In reality, the Tribe simply confuses the question of whether the Attorney General has the *capacity to sue* the Tribe on behalf of the State with the question of whether Congress waived the Tribe's immunity in the Restoration Act. The question of whether the Attorney General has the capacity to sue is a state law question, *see* FED. R. CIV. P. 17(b); the waiver of immunity inquiry is a jurisdictional question governed by federal law.

In this case, the Fifth Circuit concluded §1300g-6 expressly abrogated the Tribe's immunity from suit by the State to seek to enjoin illegal gaming activity. As the Fifth Circuit properly recognized, however, the capacity-to-sue issue is not entitled to immediate appellate review under the collateral order doctrine because capacity-to-sue issues are

routinely reviewed on appeal from final judgment.[3] Thus, the Fifth Circuit properly abstained from ruling on these issues, and the Court cannot review the issues on petition for certiorari.[4]

CONCLUSION

For the reasons stated, Respondent respectfully requests that the Tribe's petition for writ of certiorari be denied.

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3. Recognizing that the capacity-to-sue issue was not immediately appealable, the Tribe petitioned the district court to certify the issue of capacity for appeal under 28 U.S.C. §1291. R.121. The Court denied the request. R.143-44.

4. On appeal, the State alternatively argued that, even if Congress did not expressly waive tribal immunity in §1300g-6, tribal immunity did not bar the State's claim for prospective injunctive relief against tribal officials for violations of State gaming laws that were adopted by Congress in the Restoration Act as a surrogate for federal law under the *Ex parte Young* doctrine. *See Santa Clara Pueblo*, 436 U.S. at 59; *Puyallup Tribe v. Dep't of Game of Wash.*, 433 U.S. 165, 171 (1977). Howewer, the Fifth Circuit did not reach this argument.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 7 2001
OFFICE OF THE CLERK

(3)

No. 00-1413

IN THE
Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *et al*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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Come now Ysleta del Sur Pueblo, the Tigua Gaming Agency, the Tribal Council, Filbert Candelaria, and Francisco Hernandez (collectively, the "Pueblo") and file their Reply Brief to Respondent's Brief in Opposition, and would respectfully show unto the honorable Court as follows:

ARGUMENT

This is an interlocutory appeal dealing with one issue: the existence and extent of any congressional abrogation of the Pueblo's immunity with respect to the various causes of actions asserted by the State. In its Petition for Writ of Certiorari, the Pueblo raises three questions: (1) did Congress unequivocally express an intent to abrogate Petitioners' tribal-sovereign immunity from suit in section 1300g-6(c); (2)

did Congress condition the bringing of a suit under such abrogation, if any, upon the authorization by the state legislature; and (3) does the abrogation of immunity in section 1300g-6(c), if any, extend to state law causes of action? Despite the State's discussion of the matter, this appeal does not involve the scope of any federal prohibition of the Pueblo's gaming activities.

With respect to the first question raised in the Petition, the State misconstrues the Pueblo's argument concerning the interplay between section 1300g-4(f) and section 1300g-6. The Pueblo has never argued that Congress only enacted section 1300g-6 to permit the State to seek injunctive relief against tribes other than the Pueblo. Brief in Opposition, p. 9. Nor has the Pueblo argued that the provisions of sections 1300g-4(f) act as a limitation on the provisions of section 1300g-6. The Pueblo, instead, argues the exact opposite: "A reasonable interpretation of section 1300g-6(c) is that Congress has permitted the state to seek injunctive relief for violation of the federal gaming prohibition against those over whom the State would have had jurisdiction under section 1300g-4(f) if Congress had not preempted such jurisdiction under section 1300g-6(a)." Petition, p. 8. Those "over whom the state would have had jurisdiction" are *individuals* and not the Pueblo.

The State also mischaracterizes Tribal Resolution T.C.-02-86 as an "agreement" by the Pueblo to congressional abrogation of its immunity. Brief in Opposition, p. 5.[1] One may search the Resolution in vain for any mention of

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[1] *See Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1328 n.2 (5th Cir. 1994), cert. denied, 514 U.S. 1016 (1995) (wherein the Resolution is set out in full).

lawsuits, consent to judgment, or any abrogation or waiver of immunity. It simply does not exist.[2]

The State misdescribes the third question raised in the Petition as a lack of capacity issue. It is not. A fair reading of the First Amended Complaint for Injunctive to Relief[3] reveals that the Attorney General brought a new, state law claim by requesting that the Pueblo be enjoined pursuant to chapter 125 of the Texas Civil Practices and Remedies Code (public and common nuisance). Petition, p. 6. While the State and the appellate court may be confused about the Pueblo's argument, it was not lost on the district court. Prior to addressing the lack of capacity issue, the district court refused to dismiss the state law claim. The district court erroneously construed section 1300g-6(b), which provides "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas," as a valid grant by Congress "to the State of Texas to exercise regulatory authority over gambling on the Tribe's reservation". January Order fn. 5, *see* Petition, p. 23a. The court's construction is diametrically opposed to the intent clearly expressed by Congress in the statute, which is reason enough for this Court to issue its writ.

Other reasons for issuing the writ abound. The Pueblo has argued that neither this Court nor any other Courts of Appeals have traveled as far as the Fifth Circuit to find congressional abrogation of a Tribe's immunity from suit. The State offers no case law to contend otherwise. Since the test for determining whether Congress has abrogated tribal immunity

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[2] While consideration of the Resolution may be necessary to determine the scope of the federal prohibition of gaming activities, such issue is not before this Court.

[3] The State has since filed a Second Amended Complaint for Injunctive Relief; it too asserts a state law cause of action under the Texas public and common nuisance statutes. The State has never denied that it is asserting state law claims in this action.

is the same as that for determining congressional abrogation of a state's Eleventh Amendment immunity, the issue is simple: would this Court find language similar to that of section 1300g-6(c) to be sufficient to abrogate a State's Eleventh Amendment immunity? The standard being set by the Fifth Circuit directly involves every state and tribe subject to its jurisdiction.

The State further urges the Court not to issue its writ because this case impacts only one (1) tribe.[4] But what an impact. The State seeks to shut down an enterprise, causing significant, negative, economic impact not only to the Pueblo and its members, but the surrounding community of El Paso, Texas, and particularly its minority population.[5]

CONCLUSION

Petitioners respectfully request that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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[4] Actually, identical gaming provisions govern activities of the Alabama and Coushatta Indian Tribes of Texas. *See* 25 U.S.C. § 737.

[5] *See* Executive Summary of "An Evaluation of the Economic Impact of Speaking Rock Casino" by Everett G. Dillman (November 1999), in the accompanying appendix. The Pueblo has provided the State with the entirety of the report.

APPENDIX

Executive Summary

Economic Impact of Speaking Rock Casino

In November 1993 the Tigua Indian Tribe of the Ysleta del Sur Pueblo opened the Speaking Rock Casino. The primary goal of the Casino operations was to improve the economic conditions of the Pueblo members. Since the Pueblo economy is so closely tied to that of the rest of El Paso, any economic influences on the Pueblo affects the entire city.

This economic impact study has identified the following positive economic effects:

1. International Business Planners has estimated the total local direct and indirect economic impact to be approximately $823 million since the Casino opened in November 1993 through September 1999.

2. Since the Casino opened an estimated $150 million dollars, not including payroll, has been contributed directly to the El Paso economy. Over 75% of the Casino's expenditures have been made locally.

3. The Casino's payroll over this period has totaled almost $50 million dollars. Most of this payroll would have been spent locally.

4. At the current time, approximately 785 persons are employed by the Casino with an annual payroll of approximately $14 million dollars. The Speaking Rock Casino is one of El Paso's largest employers.

5. The Casino has provided many employment opportunities at the Casino for minorities. Of those who have been employed since the opening almost nine-two percent have been minorities. Hispanic employees made up almost eighty three percent of

the employees. Native Americans constituted approximately seven percent.

6. Most employees of the Casino reported that their job at the Casino represented an improvement in their economic position. Over one-third of the employees reported being unemployed prior to their current job.

7. Because of the monies provided by the Casino's operations the Pueblo has been able to make $124 million dollars in expenditures, over eighty percent in the local area.

8. The funds received from the Casino have enabled the Tribe to move towards economic self-sufficiency. Before 1993 Tribal government was operating at a substantial fiscal deficit. The Pueblo is now able to increase its governmental functions and generate a surplus. The surplus is planned for investment in other enterprises to diversify the economic base and to provide additional opportunities for the Pueblo members.

9. Prior to the Casino unemployment among the Pueblo members was estimated to be approximately fifty percent. This has been reduced to virtually zero.